

ELDEN E. WERNER
Claimant

BUD JENNINGS CARPET ONE
Respondent

**KANSAS BUILDING INDUSTRY WORKERS
COMPENSATION FUND**
Insurance Carrier

- “(1) Series of accidents arising out of and in the course of claimant’s employment with the respondent, including injury in June 2003.
- “(2) Timely notice.
- “(3) Failure of proof of an intervening accident.
- “(4) Need for medical treatment.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

The Board first determines that issue number 4, dealing with claimant's need for medical treatment, is not an issue for which an appeal is granted from a preliminary hearing.¹

Claimant, a carpet layer and laborer for respondent, alleges accidental injury initially on March 10, 2003, while pulling up glued-down carpet. Claimant testified that in his job, he installed carpets, removed old carpets, and removed and replaced furniture in the residences where the carpets were to be installed. Claimant testified that while removing glued-down carpet, he began experiencing back pain in March 2003, with a specific date of accident determined from respondent's records to be March 10, 2003. Claimant testified that he had pain from seven to ten days and then he improved. The record conflicts as to whether claimant's pain improved completely or simply got somewhat better. Regardless, claimant failed to tell respondent of his problems, expecting his condition to improve.

On June 9, 2003, claimant approached Dale Smith, respondent's manager, and advised Mr. Smith that he needed medical care for his ongoing back complaints. Claimant was sent to Chiropractic Health Center in Lawrence, Kansas, where he was treated by chiropractor James Dray. Claimant initially advised Dr. Dray that he had suffered injuries on March 10, 2003, which had resolved, but about two weeks before the June 9, 2003 examination, claimant's pain returned. Claimant testified that he believes the return of his pain was associated with having to move a couple of pianos. However, Dr. Dray's medical records make no mention of claimant moving any pianos. Claimant was treated by Dr. Dray on five occasions. Claimant confirmed that Dr. Dray, at the last visit, on June 23, 2003, told claimant that he had taken claimant "as far as he could." Claimant was upset because Dr. Dray appeared at that treatment session nearly an hour late. Also, Dr. Dray later called claimant and canceled the next session because of a conflict in his schedule. Claimant determined not to return to Dr. Dray.

Claimant was referred by his attorney to P. Brent Koprivica, M.D., board certified in emergency medicine, for an examination which took place on October 10, 2003, with a report generated from that same date. Dr. Koprivica determined that claimant's entire problem stemmed from the March 10, 2003 accident, from which claimant advised him he had not improved.

¹ K.S.A. 44-534a and K.S.A. 2002 Supp. 44-551.

Claimant continued working for respondent until June 20, 2003, at which time he quit, electing to open up his own carpet installation service, which claimant operated with his son's assistance.

Respondent contends that claimant did not suffer accidental injury through a series of accidents ending in June 2003, but instead suffered a specific accident on March 10, 2003, for which claimant failed to provide notice. Respondent contends, in the alternative, that claimant has suffered an intervening accident while working in his own carpet installation business since his termination of employment with respondent.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

In this instance, claimant alleges specific accidents on March 10, 2003, and at some time in May or June 2003, while moving pianos. Claimant also alleges a series of accidents beginning March 10, 2003, and continuing through his last day worked, June 20, 2003.

With regard to the March 10, 2003 alleged accident, the Board finds that claimant did suffer accidental injury on that date, as his description of the incident is uncontradicted. Additionally, there are records from respondent indicating that work was done on a glued-down carpet that day, which would have necessitated the carpet be torn up from the floor. However, claimant acknowledges telling no one with respondent of this accidental injury until June 9, 2003. K.S.A. 44-520 obligates that notice of accident be provided to the employer within ten days of the accidental injury. Therefore, the Board finds that claimant has failed to provide respondent timely notice of a March 10, 2003 accident, as the first notice to respondent was June 9, 2003, when claimant requested medical treatment. Therefore, benefits for that accident are denied.

Claimant alleges a second accident sometime in May or June 2003, while moving a piano. However, the medical records taken contemporaneous with or shortly after this alleged accident fail to mention any involvement with pianos. Neither Dr. Dray's nor Dr. Koprivica's reports contain those entries in their records. Additionally, claimant failed to provide respondent with specific notice of accident associated with moving pianos when he requested medical care on June 9, 2003. The Board, therefore, finds claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment in May or June 2003, while moving pianos.

² K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

Finally, claimant alleges he suffered a series of accidents through June 20, 2003, stemming from the original March 10, 2003 accident and continuing thereafter. Claimant's testimony in this instance is contradictory as he testified that after seven to ten days the pain got better. He also testified that the pain was ongoing. He advised Dr. Koprivica that he was injured on March 10, 2003, while pulling up glued-down carpet and after attempting to manage the condition with rest and self-accommodation, "his back symptoms got worse."³ The medical evidence appears to contradict claimant's testimony that his back got better and then worse or, in the alternative, that his condition continued to worsen through the last day worked. Contradictory testimony from claimant raises doubts regarding the credibility of claimant's entire testimony. The Administrative Law Judge had the opportunity to observe claimant in person. The Board will generally give some deference to an administrative law judge's determination regarding the credibility of testimony, especially that which occurs in the presence of the administrative law judge. Here, the Administrative Law Judge denied claimant benefits. This infers that the Administrative Law Judge did not believe claimant's testimony regarding the alleged ongoing series of accidents. The Board finds claimant has failed to prove that he suffered a series of accidents beginning March 10, 2003, and running through his last day worked, June 20, 2003.

The Administrative Law Judge determined in his Order that claimant suffered an intervening accident at his new employment. As the Board has determined that claimant has either failed to prove accidental injury as alleged or failed to provide timely notice, the allegation regarding an intervening accident with his new employment is rendered moot. The Board, therefore, affirms the January 26, 2004 preliminary hearing Order of the Administrative Law Judge, that claimant should be denied benefits for the accidental injuries allegedly suffered while employed with respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 26, 2004 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict should be, and is hereby, affirmed.

IT IS SO ORDERED.

³ P.H. Trans., Cl. Ex. 2 (Koprivica report, Oct. 10, 2003, p. 4).

Dated this ____ day of April 2004.

BOARD MEMBER

c: Larry G. Karns, Attorney for Claimant
Roy T. Artman, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director